No. 06-1181

In the Supreme Court of the United States

SAMSON TAIWO DADA, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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By order dated January 14, 2008, the Court directed the parties to file supplemental briefs addressing: "Whether an alien who has been granted voluntary departure and has filed a timely motion to reopen should be permitted to withdraw the request for voluntary departure prior to the expiration of the departure period."[1]

In the experience of the Attorney General, it is extraordinarily rare for an alien who has requested and been granted voluntary departure by the BIA to seek to withdraw from that arrangement within the voluntary depar-

[1] We have been informed by the Department of Homeland Security (DHS) that, on January 10, 2008, the immediate relative visa petition that formed the basis for petitioner's request to reopen his removal proceedings was denied on the ground that it was based on a sham marriage contracted solely for immigration benefits. Petitioner's wife has 30 days from the date of that denial to file with DHS a notice of appeal to the Board of Immigration Appeals (BIA or Board). 8 C.F.R. 1003.1(b)(5), 1003.3(a)(2).

ture period specified in the Board's order. The subject is not directly addressed in the Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, the Attorney General's current regulations, or any precedential decision of the BIA, and the government is not aware of any on-point decision by a court of appeals.[2]

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[2] The absence of court of appeals decisions probably is due to the courts' practice of granting judicial stays of voluntary departure. Outside limited circumstances not applicable here, 8 U.S.C. 1229a(c)(7)(C)(iv) (Supp. V 2005); 8 C.F.R. 1003.23(b)(4)(ii), the filing of a motion to reopen removal proceedings neither suspends the finality and appealability of the underlying order, nor tolls the period for seeking judicial review. *Stone* v. *INS*, 514 U.S. 386 (1995). Accordingly, an alien who wishes to seek judicial review of a BIA decision rejecting his other claims for relief but granting his request for voluntary departure must file a petition for review within 30 days. 8 U.S.C. 1252(b)(1). In the experience of the Attorney General, "aliens who have been granted voluntary departure routinely file [such] petitions * * * and seek a stay" from the courts of appeals. 72 Fed. Reg. 67,681 (2007). Although the government's position is that reviewing courts lack the authority to stay the expiration of a voluntary departure period, eight courts of appeals have reached a contrary conclusion, Gov't Mem. in Opp. at 13-17, *Gulati* v. *Mukasey*, No. 07A576 (filed Jan. 14, 2008), stay granted (Jan. 15, 2008) (Stevens, J.), and the Ninth Circuit has adopted a standing order under which an alien's motion to stay generates an automatic stay of both removal and voluntary departure "until further order of the court," 9th Cir. Gen. Order 6.4(c)(1); see *Desta* v. *Ashcroft*, 365 F.3d 741, 749-750 (9th Cir. 2004).

Because a stay of the voluntary departure period permits an alien simultaneously to retain the benefits of voluntary departure and to avoid the consequences of failing to depart within the time specified in the BIA's order, most aliens currently have no incentive to seek to withdraw a previously granted request for voluntary departure. Under the Attorney General's proposed regulations, these issues of stay practice would not arise, because the filing of a petition for review would automatically terminate the grant of voluntary departure. 72 Fed. Reg. at 67,674.

In the government's view, the proper answer to the question posed by the Court has four parts. First, an alien's unilateral assertion that he no longer wishes to be bound by his agreement to depart the United States within a specified time by itself neither modifies the BIA order providing for voluntary departure, nor excuses the alien's failure to comply with its terms. Second, the BIA has considerable discretion in deciding whether to grant an alien's motion to reopen his removal proceedings to allow him to withdraw a previously granted request for voluntary departure. Third, the record discloses at least two bases upon which the BIA could reasonably have denied petitioner's request in this case. Fourth, the Attorney General's proposed regulations, which would not in any event apply to this case, do not warrant a different result.

1. At the time he sought to withdraw his request for voluntary departure, petitioner was subject to a final order of the BIA. That order provided that petitioner was "permitted to voluntarily depart from the United States * * * within 30 days from the date of [the] order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS)." Pet. App. 5. The order further warned, however, that, "[i]n the event [petitioner] fail[ed] to so depart," the alternate order of removal would take effect automatically and he would be subject to various penalties. *Id.* at 5-6. Nothing in the order or underlying bargain gave petitioner the option of deferring the final order of removal for 28 days without the other terms of the bargain. And nothing in the INA, the Attorney General's regulations, or the BIA's order provides that petitioner's declaration that he was "withdraw[ing] his request for voluntary departure" (A.R. 13) was by itself sufficient to alter the

terms of the BIA's final order. The only mechanism for altering that order (and thus avoiding the consequences of failing to depart within the time specified in that order) was through a motion to reopen under 8 U.S.C. 1229a(c)(7) (Supp. V 2005) or a motion to reconsider under 8 U.S.C. 1229a(c)(6) (Supp. V 2005). See 72 Fed. Reg. 67,676 n.1 (2007).

The fact that voluntary departure is a form of discretionary relief that was originally granted upon petitioner's request does not alter the analysis. The government also benefits from the voluntary-departure bargain once it is agreed to. See 72 Fed. Reg. at 67,674 (describing voluntary departure as "an agreed upon exchange of benefits"). And it is black-letter law that, at least absent extraordinary circumstances, one party may not unilaterally withdraw from what was initially an entirely voluntary arrangement on the eve of his own performance. A party may of course unilaterally *repudiate* a voluntarily incurred obligation, but repudiation is generally treated as a total breach, see Restatement (Second) of Contracts § 253(a) (1979), and both the INA and the BIA's order clearly specified the consequences if petitioner defaulted on his obligation to depart within the specified time. 8 U.S.C. 1229c(b)(3); 8 U.S.C. 1229c(d)(1) (Supp. V 2005); Pet. App. 5-6.

2. Nothing in the INA or the Attorney General's implementing regulations *requires* the BIA to grant a motion to reopen to allow an alien to withdraw a previously granted request for voluntary departure. To the contrary, whether to grant reopening is at all times a matter of discretion, 8 C.F.R. 1003.2(a); *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984), and the BIA therefore has broad latitude in deciding whether to do so.

An alien is granted voluntary departure at the conclusion of removal proceedings only if the IJ has rejected *all* of the alien's asserted bases for remaining in the United States *and* the alien "has established by clear and convincing evidence that [he] * * * intends to" depart if voluntary departure is granted. 8 U.S.C. 1229c(b)(1)(D). The alien may then appeal to the BIA, which prevents the IJ's order from becoming final and suspends the voluntary departure period pending appeal. 8 U.S.C. 1101(a)(47)(B)(i), 1229c(b)(1). At any point while the appeal is pending—a period that in this case lasted nearly fourteen months, Pet. App. 5, 7—the alien may file a motion to remand to the IJ if he has new evidence bearing on his eligibility to remain in the United States. 8 C.F.R. 1003.2(c)(4); see 72 Fed. Reg. at 67,676 n.1. The alien may also, while his appeal is pending, file a motion with the BIA to withdraw his request for voluntary departure. See, *e.g.*, *In re Lopez Vazquez*, No. A78-884-763, 2007 WL 2588534 (B.I.A. Aug. 17, 2007) (unpublished) (granting such a motion). Accordingly, absent a mistake, the BIA will enter a final order granting voluntary departure *only* in situations in which the alien originally sought voluntary departure from the IJ and then failed to withdraw that request while his appeal was pending with the BIA.

Congress has provided that a subsequent motion to reopen must be based on "new facts." 8 U.S.C. 1229a(c)(7)(B) (Supp. V 2005); see 8 C.F.R. 1003.2(c)(1) (reopening must be based on "evidence [that] * * * was not available and could not have been discovered or presented at the former hearing").[3] The BIA could rea-

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[3] At oral argument, the Chief Justice inquired about what percentage of motions to reopen are granted in favor of the alien. 1/10/08 Tr. 5, 50.

sonably conclude that, at least as a general matter, no genuinely new reason for withdrawing a request for voluntary departure is likely to arise during the short voluntary departure period specified in the Board's order. As a result, the Board could further reasonably conclude that an alien's post-final order request to do so should be scrutinized closely to determine if it reflects anything more than last-minute regret.

3. The record discloses at least two bases upon which the BIA could have denied what it characterized as petitioner's request to "be permitted to withdraw his request for voluntary departure." Pet. App. 3. First, the Board could have concluded that petitioner's subsequent overstay of his voluntary departure period had rendered moot his pre-overstay request, because he was no longer eligible for adjustment of status, the ultimate relief he sought through his motion. See *Chedad* v. *Gonzales*, 497 F.3d 57, 64-65 (1st Cir. 2007) (holding that a subsequent grant of reopening does not remove the consequences that attach automatically upon an alien's "fail[ure] * * * to depart * * * within the time period specified," even if the motion to reopen was filed prior to ex-

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Due to limitations in data recording, the Department of Justice's Executive Office for Immigration Review (EOIR) can report on case dispositions, but not whether a given decision was "favorable" to an alien. EOIR did inform this Office that in fiscal year 2007, the BIA adjudicated 7804 motions to reopen that were filed by aliens alone rather than jointly with DHS. Some form of "relief" was granted in connection with 1178 of these motions, with that term being defined to include all situations in which reopening was granted for any purpose, rather than only those in which the alien ultimately obtained a modification of the original order. Of the remaining motions, 6273 resulted in "no relief," with the remaining 353 dispositions being classified as "other." If these 353 dispositions are excluded from the calculation, 15.8% of aliens' motions to reopen were granted.

piration of the voluntary departure period (quoting 8 U.S.C. 1229c(d)(1)); but cf. *Orichitch* v. *Gonzales*, 421 F.3d 595, 598 (7th Cir. 2005) (reaching contrary conclusion in case involving joint motion to reopen). Such a conclusion would work no unfairness in petitioner's case. Petitioner filed his motion on the last business day in the 30-day period during which permission to depart voluntarily under the BIA's order was to remain valid. Although he was represented by counsel, petitioner did not ask the BIA to expedite consideration of his motion and at the same time seek an extension of his voluntary departure period from DHS to afford the BIA time to act on his motion. See Pet. App. 5; 8 C.F.R. 1240.26(f); A.R. 10-21.

Second, even if the BIA viewed itself as having the *authority*, by granting petitioner's motion to reopen, to eliminate retrospectively the consequences of his failure to depart within the time specified in its previous order, the BIA could reasonably have determined that petitioner had presented no sound basis for it to exercise its discretion to do so. Petitioner sought to eliminate his obligation to depart in order to seek adjustment of status based on a marriage that occurred in 1999, five years *before* he first sought voluntary departure from the IJ. Pet. App. 8-9. At no point in the nearly fourteen months during which his appeal to the BIA was pending did petitioner seek a remand to the IJ or inform the Board that he wished to withdraw his request for voluntary departure. Rather, it was only *after* the BIA had rejected his challenge to removal and entered a final order that he informed the Board that he wanted to withdraw his request for voluntary departure to permit him to seek further consideration of the same underlying adjustment of status claim. A.R. 10. Under these circum-

stances, it would have been entirely reasonable for the BIA to conclude that petitioner had not presented any "new facts" (see 8 U.S.C. 1229a(c)(7)(B) (Supp. V 2005)), and therefore had not satisfied that statutory prerequisite for reopening to eliminate the voluntary departure provisions of the final order—or the Board could have decided in these circumstances to deny the motion to reopen simply as a matter of discretion.

Although the BIA's decision is perhaps best read as denying petitioner's request on the first ground, see Pet. App. 4 (stating that "because [petitioner] has remained in the United States after the scheduled date of departure, [he] is no[w] statutorily ineligible for the relief sought"); A.R. 2, the matter is not entirely clear. Given the discretionary nature of motions to reopen, the great volume of the Board's work, and its need to focus its efforts on its core function of adjudicating appeals rather than on ancillary motions, the Board should not be expected to write a detailed opinion (or often any opinion) when it denies such a motion. But because this Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), in the event the Court determines that the Board should have given a fuller explanation for denying petitioner's request, the proper course would be to remand to the Board for further proceedings. See *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam); *Gonzales* v. *Thomas*, 547 U.S. 183 (2006) (per curiam).[4]

4. The proposed rule that was issued by the Attorney General on November 30, 2007, does not warrant a different result here. That rule has not been adopted,

[4] The court of appeals did not directly address the issue, although it noted that petitioner sought "leave to withdraw his request for voluntary departure." Pet. App. 2.

and will not apply to petitioner's case if it is. See 72 Fed. Reg. at 67,682 ("The provisions of this proposed rule will be applied * * * only with respect to immigration judge orders issued on or after the effective date of the final rule that grant a period of voluntary departure.").

At any rate, the proposed rule is fully consistent with the conclusion that, under the current regulations and the BIA's final order, petitioner's mere assertion that he wished to withdraw from a voluntary departure arrangement does not excuse him from the consequences of failing to depart within the time specified in the Board's order. The proposed rule would alter the up-front "quid pro quo" between the government and the alien, 72 Fed. Reg. at 67,675, expressly to provide "that permission to depart voluntarily is conditioned upon the alien's agreeing to accept the finality of the Board's order * * * and depart within the period allowed * * * without seeking to challenge the final order by filing a motion to reopen or reconsider," *id.* at 67,679. See 8 U.S.C. 1229c(e) (providing that the Attorney General may "by regulation limit eligibility for voluntary departure * * * for any class or classes of aliens"). The rule thus would provide that an alien's violation of those terms of the bargain would result in the *automatic termination* of the alien's permission to depart voluntarily. See 72 Fed. Reg. at 67,686 (proposed 8 C.F.R. 1240.26(b)(3)(iii)) (providing that the IJ "shall advise the alien of" the consequences of filing "a post-decision motion to reopen or reconsider"). The premise of the proposed rule, however, is that the terms of the up-front agreement must be changed to effect this result. It thus undermines any argument that petitioner possesses a unilateral right to terminate under the current regulations.

Nor does the proposed rule suggest that the Attorney General is *required* to provide every alien who requests and is granted voluntary departure with a mechanism to escape the consequences of not departing within the specified time. Congress has granted the Attorney General broad authority with respect to removal of aliens generally, 8 U.S.C. 1103(g) (Supp. V 2005), and voluntary departure in particular, 8 U.S.C. 1229c(a)(1), (b)(1) and (e). In the event the Attorney General promulgates the proposed rule, it will represent his expert judgment that doing so will improve the overall functioning of the removal process in general and voluntary departure in particular. If such a system were adopted by regulation, IJs and the BIA could in the future take into account the risk of strategic behavior when deciding whether to grant voluntary departure in a particular case. The Attorney General could also modify the regulations if he later determined that the risks of abuse outweighed the rule's other benefits. But in all events the system envisioned by the proposed regulations is not the one under which petitioner sought, was given, and later attempted to withdraw from a grant of permission to depart voluntarily in lieu of a formal order of removal, nor is it one that should be imposed by this Court as a matter of law rather than by the Attorney General in the exercise of his discretion.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2008